NO. COA14-766

NORTH CAROLINA COURT OF APPEALS

Filed: 3 March 2015

STATE OF NORTH CAROLINA

v.

Wake County
No. 11 CRS 008656

GRANT RUFFIN HAYES

Appeal by defendant from judgment entered 16 September 2013 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 21 January 2015.

Attorney General Roy Cooper, by Assistant Attorney General Derrick C. Mertz, for the State.

Glenn Gerding, for defendant.

ELMORE, Judge.

On 16 September 2013, a jury found defendant guilty of first degree murder. The trial court sentenced defendant to life imprisonment without parole. After careful consideration, we hold that defendant received a fair trial, free from prejudicial error.

I. Facts

Laura Jean Ackerson (the victim) and Grant Ruffin Hayes (defendant) met in March 2007. Thereafter, the two engaged in a

domestic relationship, but never married. Two children were born of the relationship, and once defendant and the victim separated, a custody dispute over the children ensued. In late 2009, defendant met Amanda Hayes (Amanda) and they began dating. Defendant and Amanda married in April 2010 and moved into an apartment in Raleigh. The victim lived in Kinston.

On 29 June 2010, the Lenoir County District Court entered a consent order giving temporary physical custody of the children to defendant during the week and to the victim on weekends. As part of their temporary arrangement, the parties agreed to a psychological evaluation by Dr. Ginger Calloway, a forensic psychologist. After evaluating the parties over a period of time, Dr. Calloway issued a report recommending that defendant and the victim share legal and physical custody of the children. Over defendant's objection, Dr. Calloway testified about the contents of her report at trial.

On 12 July 2011, defendant e-mailed the victim to suggest that she see the children for a mid-week visit. The victim drove to Raleigh on 13 July, texting defendant at 4:12 p.m., "I'm leaving the Wilson area now. I'll call when I get past the traffic. Where will you be in [an] hour or so?" The victim also called defendant, with the last outgoing call occurring at 4:59 p.m. near Crabtree

Valley mall "going outbound toward [defendant's] apartment[.]" Chevon Mathes, the victim's friend and business partner, knew that the victim was going to Raleigh and expected a business related call from her at approximately 9:00 p.m., which she never received.

In the early hours of 14 July, defendant bought goggles, trash bags, a reciprocating saw, blades, plastic sheeting, tarp, gloves, bleach, tape, and a lint roller at Wal-Mart and Target in Raleigh. Amanda called her daughter, Sha, later that morning, and Sha took the children to Monkey Joe's, a play center, in Raleigh for most of the day. On 16 July, defendant bought coolers and ice. He also rented a U-Haul trailer and indicated that his destination was Texas. Amanda called Sha and told her that she was going to Texas to see her sister, Karen Berry. Defendant, Amanda, and the children drove to Texas in the U-Haul and arrived at Ms. Berry's house in the late hours of 17 July or early in the morning of 18 July.

On 19 July, defendant bought gloves and bottles of acid from Home Depot. Surveillance cameras captured Amanda dumping some of the bottles in an area near Ms. Berry's residence. Ms. Berry's residence was also located near a creek that was often used for fishing. Ms. Berry testified that defendant and Amanda took her boat into the creek on the night of 19 July. When investigators

later searched the creek, they found the victim's decomposed and dismembered body parts. The State's expert witness pathologists testified at trial that the victim's cause of death was "homicide by und[et]ermined means" or "undetermined homicidal violence."

Defendant returned the U-Haul trailer on 20 July and drove with Amanda and the children back to Raleigh. Mathes became concerned about the victim's disappearance and notified law enforcement. After launching an investigation, law enforcement officers searched defendant's apartment on 20 July. In addition to a bleach stain, missing furniture, and cleaning products, they also found lyrics to a song entitled, "Man Killer." The lyrics concerned the first-person killing of a woman by making her bleed and by strangulation. Over defendant's objection at trial, the trial court admitted the song lyrics into evidence.

The State also offered the witness testimony of Pablo Trinidad at trial. Trinidad testified that in July 2011, he was being held in the Wake County Detention Center on federal charges while defendant was being held in the same location for the murder charge. Trinidad stated that he met defendant because they were housed in the same area. One day, inmates saw defendant's case being discussed on television and wanted to harm him, but Trinidad diffused the situation. Trinidad testified that at some point

after this incident, defendant told him that he called the victim and "lured" her to his apartment under the "false pretenses" of settling the custody dispute, "subdued" her with Amanda's help, strangled her, and drove out of state to dispose of the body.

II. Analysis

a.) Dr. Calloway's Report and Testimony

Defendant first argues that the trial court erred by admitting Dr. Calloway's report into evidence and by allowing her to testify about the report. Defendant specifically avers that information about defendant and the victim that was presented in Dr. Calloway's testimony and report was inadmissible under both the North Carolina Rules of Evidence 402, 404, and 802 and the Confrontation Clause of the United States Constitution because it allegedly discussed: 1.) defendant's history of illicit drug use, 2.) defendant having suffered from possible mental illness, 3.) defendant's character for untruthfulness, 4.) Dr. Calloway's opinion that defendant wanted to "obliterate" the victim, 5.) defendant's prior conviction for DWI, and 6.) sympathy for the victim and her good character.

i. Confrontation Clause

We first address defendant's argument that Dr. Calloway's report and testimony violated the Confrontation Clause of the United States Constitution because they contained third party

statements from non-testifying witnesses who were not subject to cross-examination. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766, 767 (2010). "The Confrontation Clause bars testimonial statements of witnesses if they are not subject to cross-examination at trial unless (1) the witness is unavailable and (2) there has been a prior opportunity for cross-examination." *State v. Walker*, 170 N.C. App. 632, 635, 613 S.E.2d 330, 333 (2005). However, "where evidence is admitted for a purpose other than the truth of the matter asserted, the protection afforded by the Confrontation Clause against testimonial statements is not at issue." *Id.*

After reviewing the record, it is clear that the trial court admitted Dr. Calloway's report and testimony to the extent that it was relevant upon the issue of defendant's state of mind, not for the truth of the matter asserted (see the trial court's limiting instruction below). Accordingly, the third party statements found in Dr. Calloway's report and testimony were not inadmissible on Confrontation Clause grounds. *See id.*

ii. Relevancy and Prejudicial Effect

Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2013). Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2013). Moreover, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. Gen. Stat. § 8C-1, Rule 404(b) (2013). However, "where evidence is relevant for some purpose other than proving character, it is not inadmissible because it incidentally reflects upon character." *State v. Anderson*, __ N.C. App. __, __, 730 S.E.2d 262, 267 (2012) (citations and quotation marks omitted). This Court reviews *de novo* the legal conclusion that the evidence is admissible to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident within the permissible coverage of Rule 404(b). *State v. Green*, __ N.C. App. __, __, 746 S.E.2d 457, 461 (2013) (citation and quotation marks omitted).

Upon our review of issues arising from Rules 401 and 403, this Court has noted:

> [a]lthough the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal. Because the trial court is better situated to evaluate whether a particular piece of evidence tends to make the existence of a fact of consequence more or less probable, the appropriate standard of review for a trial court's ruling on relevancy pursuant to Rule 401 is not as deferential as the abuse of discretion standard which applies to rulings made pursuant to Rule 403.

Dunn v. Custer, 162 N.C. App. 259, 266, 591 S.E.2d 11, 17 (2004) (citations and quotation marks omitted).

Before Dr. Calloway testified, the trial court provided the jury with a limiting instruction regarding her testimony as to the report:

> Let me -- I need to give the jury some limiting instructions with regard to this testimony. Okay?
>
> Ladies and gentlemen, Ginger Calloway is not here as an expert witness. She is here as a fact witness. And as such, she is permitted to testify about her report, which I believe is State's Exhibit 406. The report itself is in evidence. The report and her testimony about it may be relevant in this trial but only to the extent it may have been read by the victim or read by the defendant or read by both and that it may have had some bearing on either of them or both of them that caused them to form impressions about the upcoming August 15 custody dispute. Therefore, this information should be considered only to the extent that you find it is relevant and it

> bears upon the state of mind of Grant Hayes or Laura Ackerson or of both of them on or about July 13 of 2011. Otherwise, you may not consider this information for any other purpose. It is not received into evidence to prove the truth or the accuracy of the matters contained in the report but only to the extent that that report, in reviewing it, affected the mind of the victim, the alleged victim, or the defendant. And therefore I caution you and ask you to limit your evaluation of this evidence solely for that purpose.

During jury instructions, the trial court re-emphasized that the jury could only consider Dr. Calloway's report and testimony related to that report for a limited purpose:

> Ladies and gentlemen, State's Exhibit 406, a child custody evaluation report, and testimony from the author of that report was received into evidence for a limited purpose. You may consider that evidence only to the extent that you find it relevant on the issue of Laura Ackerson's state of mind and intentions regarding custody of her children on July 13, 2011, and the state of mind of the defendant on July 13, 2011, as it relates to child custody and to any motive or intent involving the crime charged in this case. You may consider this evidence only for that limited purpose and for no other purpose.

The report and testimony primarily focused on "what [were] [in] the best interests of the children with regard to parental access or custody." In answering this question, Dr. Calloway obtained background information about the relationship between defendant and the victim, met with both of them to "ask them for

their concerns generally, and tr[ied] to get some sense of their interaction with each other[,]" and conducted psychological assessments in the form of home visits, behavioral observations, and interaction with the children. The report, which spans over fifty pages, also contains Dr. Calloway's written observations of: defendant's drug use, his possible mental illness, his untruthfulness toward her during the evaluation process, her opinion that defendant desired to "obliterate" the victim's relationship with the children, his prior conviction for DWI, and according to defendant, her sympathy for the victim.

Based on her findings, Dr. Calloway recommended, in relevant part, that both parents share legal and physical custody, both children enter preschool programs that will "compensate for any parental deficiencies exhibited by both parents[,]" defendant obtain a parent coach to help him "provide a greater sense of reassurance and comfort to his children[,]" defendant "be referred to a psychiatrist for evaluation regarding the question of a mood disorder or other possible explanations for the illogical, disturbed thinking he exhibits", random drug screens for both parents, and the court retain oversight over the family.

Thus, the "bad character" evidence purportedly discussed in the report and testimony, whether in fact true or not, was

considered by Dr. Calloway in reaching her child custody recommendation. Because Dr. Calloway's report was arguably unfavorable to defendant and the report was found in defendant's car with handwritten markings throughout the document, Dr. Calloway's report and ensuing testimony were relevant for the State to argue the effect of the report on defendant's state of mind—that the report as a whole created some basis for defendant's ill-will, intent, or motive towards the victim.

Although the report incidentally reflected on defendant's character, the probative value of Dr. Calloway's report and testimony substantially outweighed the potential prejudicial effect to defendant. The reflections of defendant's character, which comprised a small portion of the report, were not admitted for the truth of the matters asserted. Rather, they were offered to demonstrate how the resulting recommendations were relevant to defendant's state of mind. Thus, the admission of Dr. Calloway's report and testimony was not error.

iii. Prejudicial Error

Even if we agreed with defendant that the trial court erred by admitting Dr. Calloway's report and testimony, defendant must also show that he was prejudiced by these errors. *See State v. Hernandez*, 188 N.C. App. 193, 204, 655 S.E.2d 426, 433 (2008) ("To

establish reversible error, a defendant must show a reasonable possibility that had the error not been committed a different result would have been reached at the trial."). If "abundant evidence" exists "to support the main contentions of the state, the admission of evidence, even though technically incompetent, will not be held prejudicial when defendant does not affirmatively make it appear that he was prejudiced thereby or that the admission of the evidence could have affected the result." *State v. Young*, 302 N.C. 385, 389, 275 S.E.2d 429, 432 (1981) (citation and quotation marks omitted).

Defendant has failed to carry his burden of showing that had Dr. Calloway's report and corresponding testimony not been admitted at trial, a reasonable possibility exists that the jury would have reached a different result. The State presented other abundant evidence of defendant's guilt.

Many witnesses testified to the tumultuous relationship between defendant and the victim, especially with regard to their child custody dispute. While the victim and defendant were in a relationship, defendant mentally and physically abused the victim, and defendant openly expressed his frustration with the high expenses associated with the custody issue and his belief that the victim was "gold digging" and "putting [him] through hell."

On Tuesday, 12 July, defendant e-mailed the victim and offered to let her see the children the next day. On occasion, the victim met defendant at Monkey Joe's, and less frequently, she went to defendant's apartment. Defendant's friend, Lauren Harris, was a manager at Monkey Joe's and allowed the children to play there free of charge. Harris testified that on 13 July, defendant did not bring the children to Monkey Joe's.

Based on phone records and cellular data, defendant and the victim communicated throughout the day on 13 July. The final outgoing call made by the victim on her cell phone was to defendant while she was driving in a direction towards his apartment. Investigators ultimately discovered the victim's car in a nearby apartment complex, which was the location of defendant's prior residence.

At approximately 2:30 a.m. on 14 July, defendant bought an abundance of cleaning materials and tools. Between 10:00-10:30 a.m. that morning, Sha, defendant's step-daughter, took the children to Monkey Joe's after receiving a call from Amanda. Sha remained with the children at Monkey Joe's until nearly 4:00 p.m. At 5:31 p.m., another surveillance video showed defendant at Target purchasing several containers of bleach, paper towels, two sets of gloves, electrical tape, and a lint roller. Amanda then asked Sha

to bring her vacuum to their apartment, which she did by 6:00 p.m. Defendant also posted an ad on Craigslist to sell various items in his apartment.

When law enforcement officers later searched defendant's apartment, they noticed a bleach stain on the carpet near the entrance and missing furniture. A load of trash collected from defendant's apartment dumpster also yielded a vacuum cleaner, toilet scrub brushes, bleach containers, respirator mask packaging, gloves, and a bleach-stained towel. DNA on a latex glove contained the victim's DNA profile.

On 18 July 2011, Detective James Gwartney, who was investigating the victim's disappearance, contacted defendant for possible leads. Despite being at Ms. Berry's house in Texas, defendant told Detective Gwartney that he was in Raleigh and provided inconsistent information about his interaction with the victim on 13 July.

Ms. Berry testified that defendant and Amanda took her boat out into the nearby creek on the night of 19 July and were gone for a "couple of hours." Ultimately, divers found a torso, portions of a leg, and a head in the creek, which were later determined to have been the victim's body parts. Ms. Berry also testified that Amanda told her that she was "covering for

[defendant]." Just before defendant and his family left the Berry residence, Amanda's niece, who lived at Ms. Berry's house in Texas, observed defendant and overheard him stating, "I don't need an alibi, I was with my family[.]"

At trial, the State's expert witness pathologists could not determine the exact cause of death due to the decomposed remains, but concluded that the victim's death was caused by "homicide by undetermined means." They testified that strangling or stab wounds to the neck area could have caused the victim's death. The State also offered Trinidad's testimony that defendant admitted to committing the crime.

In light of the State's evidence discussed above, even if the trial court erred by admitting Dr. Calloway's report and testimony, any such error was non-prejudicial.

b.) Pathologists' Testimony

Defendant also argues that the trial court erred by allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[.]" Specifically, defendant argues that the pathologists' testimony was inadmissible because there were insufficient factual bases for their opinions and the State established no foundation to show that "homicide" was a medical term-of-art. We disagree.

Defendant concedes that we should review this issue for plain error because his attorneys did not object to the admission of the pathologists' testimony at trial. We "review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996). "Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993). Plain error arises when the error is "so basic, so prejudicial, so lacking in its elements that justice cannot have been done[.]" *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations and quotation marks omitted).

N.C. Gen. Stat. § 8C-1, Rule 704 (2013) states that "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Our Supreme Court has interpreted Rule 704 and drawn "a distinction between testimony about legal standards or conclusions and factual premises." *State v. Parker*, 354 N.C. 268, 289, 553 S.E.2d 885, 900 (2001).

While an expert may provide opinion testimony "regarding underlying factual premises[,]" he or she cannot "testify regarding whether a legal standard or conclusion has been met at least where the standard is a legal term of art which carries a specific legal meaning not readily apparent to the witness." *Id.* (citation and quotation marks omitted).

The pathologists in this case were tendered as experts in the field of forensic pathology. A review of their testimony makes clear that they used the words "homicide by unde[te]rmined means" and "homicidal violence" within the context of their functions as medical examiners, not as legal terms of art, to describe how the cause of death was homicidal (possibly by asphyxia by strangulation or repeated stabbing) instead of death by natural causes, disease, or accident. Their ultimate opinion was proper and supported by sufficient evidence, including injury to the victim's fourth cervical vertebra, sharp force injury to the neck, stab wounds, and damage to certain "tissue and thyroid cartilage[.]" Accordingly, the trial court did not err by admitting the pathologists' testimony. *See id.* at 290, 553 S.E.2d at 900.

Assuming *arguendo* that the admission of the pathologists' testimony regarding the victim's cause of death was error, it is highly unlikely that absent the error, the jury probably would

have reached a different result. At trial, defendant did not appear to challenge that the victim had been killed. In fact, defendant's theory at trial was that Amanda killed the victim. During opening statements, defendant's attorney stated: "The evidence will show that the death of [the victim] happened in a spontaneous, unpredictable way at the hands of Amanda Hayes. [Defendant] helped clean up the evidence and dispose of the body. That's a serious thing, that's a terrible thing, but it's not murder." During closing arguments, defendant's attorney told the jury:

> The reliable evidence in this case points to Amanda Hayes. . . . She said she hurt [the victim]. . . . Amanda created the body so Amanda was in charge of getting rid of it. . . . Remember she called Sha on the way there and said, 'I need my big sister.' She needed her big sister because she had killed somebody. . . . Amanda Hayes' confession is a reasonable doubt. . . . She didn't say we. She said I, 'I hurt [the victim],' and that's reasonable doubt. . . . It was Amanda's plan because Amanda was responsible for killing Laura.

Moreover, the trial court provided a limiting instruction to the jury about their consideration of expert testimony:

> In making this determination as to the testimony of an expert witness, you should consider, in addition to the other tests of accuracy and weight and credibility I previously mentioned, evidence of the witness's training, qualifications and

> experience, or lack thereof; the reasons, if any, given for the opinion; whether the opinion is supported by the facts that you find to exist from the evidence; whether the opinion is reasonable; and whether the opinion is consistent with other believable evidence in the case. You should consider the opinion of an expert witness, but you are not bound by it. In other words, you're not required to accept an expert witness's opinion to the exclusion of the facts and circumstances disclosed by other testimony.

Thus, defendant's own uncontested position at trial that Amanda killed the victim, the trial court's limiting instruction, and the other aforementioned evidence pointing to defendant's guilt would preclude us from holding that the pathologists' opinion testimony was plain error.

c.) Detective Faulk's Testimony

Defendant next argues that Detective Jerry Faulk's admitted testimony that Trinidad's previous statements to federal agents were consistent with Trinidad's statements to him on 6 August 2012 constituted prejudicial error and plain error. We disagree.

i. Impermissible Hearsay

Defendant's first sub-argument is that a portion of Detective Faulk's testimony constituted impermissible hearsay. We disagree. We review this issue *de novo*. *See State v. McLean*, 205 N.C. App. 247, 249, 695 S.E.2d 813, 815 (2010) ("The admissibility of evidence at trial is a question of law and is reviewed *de novo*.).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2013).

The testimony at issue is the following:

> PROSECUTOR: You had been questioned about the various dates of those articles that were available, apparently, on the internet on those dates. With regard to Pablo Trinidad, you indicated that you interviewed him in June of 2012; is that right?
>
> DETECTIVE FAULK: I believe when they showed me my report, it's actually August.
>
> PROSECTUOR: August 2012?
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And prior to that, you were aware that he had been interviewed by other law enforcement agents in a federal debriefing, weren't you?
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And at that time that he had given information related to this homicide case and Grant Hayes and information that he had at that time?
>
> DEFENSE COUNSEL: I'm going to object to the multiple layers of hearsay here.
>
> THE COURT: Overruled. Go ahead.
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And were you aware that the

> interview with the federal agents in which he gave information about this homicide took place January 5 of 2012?
>
> DETECTIVE FAULK: Correct.

Defendant's argument fails because the prosecutor merely asked Detective Faulk whether he was aware that: 1.) Trinidad had been interviewed by federal agents and 2.) Trinidad had provided information related to this case. Detective Faulk indicated that he had knowledge of such facts, but he did not testify about what Trinidad actually told federal agents. Thus, Detective Faulk's statements above were not hearsay.

ii. Other Hearsay Issues, Confrontation Clause, and Improper Bolstering

Defendant also argues that Detective Faulk impermissibly testified about Trinidad's statements to federal agents because Detective Faulk learned about the contents of Trinidad's statements by way of hearsay. Defendant avers that the admission of this testimony violated the Confrontation Clause of the United States Constitution. He also argues that the characterization of Trinidad's statements to federal agents as "consistent" with his statements to Detective Faulk was an improper opinion serving to bolster Trinidad's credibility. We review these issues for plain error, as asserted by defendant in his brief, because defendant's

trial counsel failed to timely object to Detective Faulk's testimony concerning Trinidad's statements to the federal agents.

The relevant portion of Detective Faulk's testimony is the following:

> PROSECUTOR: And were you aware that the interview with the federal agents in which he gave information about this homicide took place January 5 of 2012?
>
> DETECTIVE FAULK: Correct.
>
> PROSECUTOR: And did you -- did you have that information available to you before you went to speak with Mr. Trinidad?
>
> DETECTIVE FAULK: Yes.
>
> PROSECUTOR: And what type of information were you aware that Mr. Trinidad had provided to the federal authorities related to this homicide in January of 2012?
>
> DETECTIVE FAULK: Specifics, I don't recall, but it was consistent with the information that he gave me during my interview.
>
> PROSECUTOR: And during your interview, what information did he provide to you?
>
> DETECTIVE FAULK: It was consistent with his testimony here in court. He said that he had spoken with Grant while locked up with him for a period of a week or two. He said that Grant spoke with him about this case and provided him some details regarding this case, said that Grant told him that -- that he had contacted the victim in this case, Laura Ackerson, and wanted to -- told -- asked to meet with her regarding the children, and he used the term 'lured her to his apartment,'

> where he and his wife, Amanda Hayes, then killed her, cut up her body, and took her to Texas to dispose of the body.
>
> PROSECUTOR: In -- so basically, that information that he gave you when you spoke with him in August of 2012 was consistent with information that he had provided to the federal authorities back in January of 2012?
>
> DETECTIVE FAULK: Correct.

Even if we presume *arguendo* that Detective Faulk's testimony about the contents of Trinidad's statements to federal agents amounted to impermissible hearsay, violated the Confrontation Clause, and constituted an improper bolstering opinion, defendant has failed to establish plain error.

After reviewing the record, we do not believe that Detective Faulk's testimony by itself tilted the scales and caused the jury to reach its verdict. Notwithstanding the contested portions of Detective Faulk's testimony, Trinidad testified at trial that he met defendant in the Wake County Detention Center in July 2011 and had the opportunity to befriend him. With regard to the homicide, Trinidad testified that defendant told him:

> [the victim] was an unfit mother, that they've been going on a – they've been having a custody battle for some years now, going back and forth, and that she was soliciting herself on the internet, she was doing drugs, that she continuously asked for money, and he was just tired of it going back and forth with that. So he said that he placed a call to her and lured

> her to his apartment, and that's when him and his wife subdued her and strangled her.
>
> Later on after that -- they had dismembered the body, and afterwards they took her on a road trip in -- out of state, out of town, and got rid of the body.

Detective Faulk testified that the information provided by Trinidad to him during their previous interview was consistent with Trinidad's trial testimony. Moreover, the information elicited at trial regarding Trinidad's alleged statements to federal agents was essentially identical to Trinidad's trial testimony and his previous statements to Detective Faulk. Thus, even if Trinidad's alleged statements to federal agents were absent from the jury's purview, the jury nonetheless considered essentially the same evidence.

The jury also heard evidence related to Trinidad's credibility. Trinidad testified with the hope of "hav[ing] some consideration given at some point down the road" for his 21-year sentence for conspiracy to traffic in cocaine and possession of a firearm. Defendant's attorney cross-examined Trinidad at length and in detail with regard to what defendant allegedly told him and focused on the potential unreliability of his testimony based on his incentive to provide evidence for the State. Defendant's attorney also had the opportunity to ask Trinidad questions about

his statements to federal agents. Additionally, the trial court provided the jury with a limiting instruction relating to Trinidad's testimony as an interested witness. Based on the foregoing evidence, we reject defendant's argument that the admission of Detective Faulk's testimony regarding Trinidad's statements to federal agents constituted plain error.

d.) Admission of Song Lyrics

Next, defendant argues that the trial court erred by admitting into evidence song lyrics allegedly authored by defendant. We disagree.

i. Authentication

In his first sub-argument, defendant contends that the State presented no sufficient evidence of "authorship" such that "the jury could conclude that [defendant] wrote the lyrics[.]" However, we cannot consider this argument on appeal because authentication was not the basis of the objection to the entry of the song lyrics at trial (see colloquy below) and defendant does not request this Court to review this issue for plain error.

ii. Relevancy and Prejudicial Effect

Defendant avers, in his second sub-argument, that the song lyrics were not relevant. Even if they were relevant, defendant argues that the probative value of the lyrics was substantially outweighed by its prejudicial effect.

At trial, defendant's attorney objected to the State's introduction of the song lyrics on the following grounds:

> DEFENDANT'S ATTORNEY: We would object, or we did at the bench, on the basis of relevancy, and to the extent there was any relevancy, on 403, the unfair prejudice of that song or that piece of paper that was found in his home would outweigh any probative value. And we also object under due process clause, right to a fair trial.
>
> THE COURT: The Court does find that the probative value outweighs any prejudicial effect and has overruled your objection. The words in the song and also the -- the way in which they're used the jury may find relevant, and therefore the objection is overruled.

The State offered a copy of song lyrics that were found by law enforcement officers during the course of their investigation in "the room that was used as an office studio" in defendant's apartment. Testimony at trial showed that defendant was an aspiring musician and song writer. Detective Faulk testified as to the contents of the song lyrics by reading directly from the lyrics themselves:

> The title is 'Man Killer.' The first line, M and then some information in brackets. Then it goes, 'Give in to me. I want it all. I want your scream and I want your crawl. I'll make you bleed. Fall to the floor. Don't try to plead. That turns me on. I'll take the keys to your car and some more.'
>
> The next portion, 'As the dogs come, try to walk them over. Start your line there, right

> around her shoulder. As her mom and dad come, walk them away. Tell 'em she died fast. They'll know she wasn't in pain.' The next portion, 'I'm not the one to make you scream. I'm just the one to make you bleed. Don't raise your arms. You can't stop me. I'll put my hands on your throat and squeeze.' Then the last line is chorus, 'Hallelujah.'

Pertinent evidence related to the murder charge showed that the victim's car had been potentially moved from defendant's apartment to a nearby apartment complex, the victim had been stabbed, and that defendant told Trinidad he had strangled the victim.

In light of the similarities between the lyrics and the facts surrounding the charged offense, the lyrics were relevant to establish identity, motive, and intent, and their probative value substantially outweighed their prejudicial effect to defendant. Accordingly, we do not find error in the admission of the lyrics.

We also note that even if the trial court erred by admitting the song lyrics into evidence, any such error was not prejudicial due to the other abundant evidence of defendant's guilt previously discussed in this opinion.

e.) Jury Instructions

Finally, defendant argues the trial court erred by manifesting a belief that it lacked discretion to allow the jury to review exhibits in the deliberation room and review a portion

of a witness's testimony. Defendant avers that the trial court's erroneous preemptive instruction effectively denied the jury an opportunity to make such a request. We disagree.

Pursuant to N.C. Gen. Stat. § 15A-1233 (2013):

> (a) If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.
>
> (b) Upon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence. If the judge permits the jury to take to the jury room requested exhibits and writings, he may have the jury take additional material or first review other evidence relating to the same issue so as not to give undue prominence to the exhibits or writings taken to the jury room. If the judge permits an exhibit to be taken to the jury room, he must, upon request, instruct the jury not to conduct any experiments with the exhibit.

N.C. Gen. Stat. § 15A-1233. "To comply with this statute, a court must exercise its discretion in determining whether or not to permit the jury to examine the evidence. A court does not exercise

its discretion when it believes it has no discretion or acts as a matter of law." *State v. Garcia*, 216 N.C. App. 176, 178, 715 S.E.2d 915, 917 (2011) (citation and quotation marks omitted).

Even if we assume that defendant preserved this issue for appellate review despite his counsel's failure to object to the trial court's instructions, his argument nonetheless fails.

The trial court, in relevant part, stated the following to the jury during jury instructions: "If you request to see an exhibit, for instance, under the rules of the court, exhibits cannot go back to the jury room. And therefore, I'll have to bring you back out in the courtroom, and we will let you see the exhibit in whatever manner that's appropriate."

Later on during the instructional phase, a juror then asked, "[a]re the transcripts then not available to us?" The trial court responded to the juror's inquiry prospectively:

> We've actually had three court reporters in this case. The testimony of no witness has been transcribed. It's not likely they'd be. When [court reporter #1] takes this down in shorthand, basically, there is no transcript. She or [court reporter #2] or [court reporter #3], any of the three court reporters that we had here, would have to type up the transcript, the testimony, if you ask me to allow you to review testimony. And the rules of the court require that if you make that request, you're required to review the entire testimony of the witness. You can't just say I want to hear the cross-examination of a

> witness or part of the testimony. It requires that you -- if you consider it, you have to consider all of the testimony of a particular witness if you're interested in that. And, normally, I simply would have the testimony read back to you, and therefore it would take -- you can't just flip through the transcript. It would take -- for planning purposes, it would take as long as it took a witness to testify, at least, for the court reporter to read back to you the testimony. And she would read question, answer, question, answer, question, answer. So from just -- *I do have the discretion to allow testimony to be reviewed by the jury. I also have the discretion to deny that request. And I'll consider any request that you make on a -- under the circumstances as you present it to me*, but I tell you now that there is no written transcript of any testimony in the case. Hopefully, collectively, you will all remember the important aspects of any witness's testimony, but *if you reach a point where you simply decide we can't make a decision until we hear this again, then let me know, and we'll make an effort to accommodate any reasonable request that you make*.

(emphasis added). We first note that although the trial court erroneously stated that the court rules require that the jury review all, not just parts, of a witness's testimony, and that exhibits cannot go back to the jury room for review, it did not make these comments in response to specific jury requests to review evidence. Thus, the provisions of N.C. Gen. Stat. § 15A-1233 do not apply. Accordingly, defendant's argument that the trial court violated the statute by manifesting a belief that it lacked

discretion to allow the jury to review a portion of a witness's testimony and take evidence back to the jury room fails.

In support of his argument that the trial court violated N.C. Gen. Stat. § 15A-1233 by providing a preemptive instruction that denied the jury an opportunity to make any evidentiary requests, defendant relies on *State v. Johnson*. 164 N.C. App. 1, 20, 595 S.E.2d 176, 187 (2004). In *Johnson*, we held that, even in the absence of an actual jury request, the trial court erred by making "pretrial comments [that] could have foreclosed the jury from making a request for . . . testimony or evidence." *Id*. The *Johnson* court found "a failure to exercise discretion" where the trial court instructed, "[t]here is no transcript to bring back there. . . . [W]e don't have anything that can bring it back there to you. . . . Surely one of you can remember the evidence on everything that come [sic] in." *Id*. at 19, 595 S.E.2d at 187.

Unlike in *Johnson*, the trial court's own words in the present case indicated his knowing ability to exercise discretion when ruling on the jury's request to review evidence. Moreover, the trial court here did not preemptively foreclose the jury from making a future request to review evidence. To the contrary, the trial court instructed the jury that although no transcript of the case existed at that moment, it would consider each request on a

case by case basis and attempt to "accommodate any reasonable request" if necessary. Accordingly, the trial court did not violate the provisions of N.C. Gen. Stat. § 15A-1233. Thus, defendant's argument fails.

III. Conclusion

We hold that the trial court did not err by admitting into evidence: Dr. Calloway's report and testimony, the pathologists' testimony that the victim's cause of death was "homicide[,]" and the song lyrics. Moreover, the trial court's jury instructions complied with the provisions of N.C. Gen. Stat. § 15A-1233. Finally, any purported error arising from the admission of Detective Faulk's testimony about Trinidad's statements to federal agents did not amount to plain error.

No prejudicial error.

Judges DAVIS and TYSON concur.